

August 2, 2005

Steven L. Keel
[Address Redacted]
Moreno Valley, CA 92557

**Re: Your Request for Advice
Our File No. I-05-140**

Dear Mr. Keel:

This letter is in response to your request for informal assistance¹ regarding post-governmental employment provisions of the Political Reform Act (the “Act”).² This letter should not be construed as assistance on any conduct that may have already taken place. In addition, this letter is based on the facts presented. The Fair Political Practices Commission (“Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71; Govt. Code section 83114.)

QUESTIONS

1. What limitations does the Political Reform Act impose on you in working on existing contracts between your new employer and the Riverside County Transportation Commission and the County of Riverside for transportation improvement projects on state highways where Caltrans will review, approve, and process the engineering and environmental documents for these projects?

2. Under the provisions of the Act’s one-year ban, what constitutes “influencing decisions” and do the restrictions prevent you from directly interacting with other Caltrans districts besides district 8?

3. Does the one-year ban mean that you cannot have any contact with Caltrans? Can you work “behind the scenes” for CH2M HILL and their clients on transportation projects involving Caltrans (e.g., technical document preparation and review, quality

¹ Pursuant to regulation 18329, subdivision (c)(3)(copy enclosed), informal assistance does not confer immunity.

² Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

control, scheduling, professional advice and guidance) as long as you do not directly interact with Caltrans?

CONCLUSIONS

1. As a former state government employee, you are subject to the Act's post-governmental employment restrictions including the permanent ban on "switching sides" and the one-year "revolving door" restrictions, as outlined below.

2. An appearance or communication is "for the purpose of influencing" if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding. The restrictions apply to contacts made with all Caltrans districts and employees.

3. The one-year ban applies to any contacts with Caltrans or Caltrans employees if made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. You may work "behind the scenes" for CH2M HILL and their clients on transportation projects involving Caltrans as long as you do not appear before or communicate with Caltrans or its employees, and the proceeding is not one that would be subject to the restrictions of the permanent ban, as discussed below.

FACTS

The state position you are leaving is with the California Department of Transportation ("Caltrans"), as Deputy District Director (CEA 1) for Environmental Planning in District 8, comprising Riverside and San Bernardino Counties. Your duties at Caltrans involved ensuring the District's projects, and those of local agencies seeking federal funding for certain transportation projects, complied with all applicable state and federal environmental requirements (e.g., California Environmental Quality Act, National Environmental Policy Act) and permits (e.g., California Department of Fish and Game 1600, Army corps of Engineers 404, State Water Quality Control Board 401).

You have accepted a position with CH2M HILL as a "Senior Project Manager." CH2M HILL has existing contracts with the Riverside County Transportation Commission (RCTC) and the County of Riverside for transportation improvement projects on state highways. As such, Caltrans District 8 will review, approve, and process the engineering and environmental documents for these projects.

ANALYSIS

Public officials who leave state service are subject to two types of post-governmental restrictions under the Act, colloquially known as the "revolving door" prohibition and the permanent ban on "switching sides." The first restriction is the "permanent ban" prohibiting a former state employee from "switching sides" and

participating, for compensation, in any specific proceeding involving the State of California if the proceeding is one in which the former state employee participated while employed by the state (see sections 87401-87402, regulation 18741.1). The second restriction is the “one-year ban” prohibiting a state employee from communicating, for compensation, with his or her former agency for the purpose of influencing certain administrative or legislative action (see section 87406, regulation 18746.1).

I. The Permanent Ban on “Switching Sides”

The first post-employment restriction under the Act is a permanent prohibition on influencing any judicial, quasi-judicial, or other proceeding in which the administrative official participated while in state service. (Sections 87401 and 87402; regulation 18741.1.) In other words, a public official may never “switch sides” in a proceeding after leaving state service.

Sections 87401 and 87402 provide:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

“(a) The State of California is a party or has a direct and substantial interest.

“(b) The proceeding is one in which the former state administrative official participated.” (Section 87401.)

“No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.” (Section 87402.)

Section 87400, subdivision (c) defines “judicial, quasi-judicial, or other proceeding as:

(c) “Judicial, quasi-judicial or other proceeding” means any proceeding, application, request for a ruling or other determination,

contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency, including but not limited to, any proceeding governed by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code.

An official is considered to have “participated” in a proceeding if the official took part “personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee....” (Section 87400(d).) A former state official who held a management position in a state administrative agency is deemed to have participated in a proceeding if: (1) the proceeding was pending before the agency during his or her tenure, and (2) the proceeding was under his or her supervisory authority. (Section 87400(d); regulation 18741.1(a)(4).)

“The permanent ban does not apply to a ‘new’ proceeding even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated. A ‘new’ proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual issues from those considered in previous proceedings.” (*Rist* Advice Letter, No. A-04-187; see also *Donovan* Advice Letter, No. I-03-119.)

You have not provided any information as to your participation in any proceeding while employed as a state administrative official at Caltrans that may affect your ability to engage in any of the conduct listed herein. To apply the permanent ban to your situation, you need to determine if any of the actions in which you now wish to engage on behalf of your new employer involve a proceeding in which you participated while employed at Caltrans, or were deemed to have participated as a supervisor. (Regulation 18741.1(a)(4).)

II. The One-Year Ban — “Revolving Door”

A. Application of the One-Year Ban.

Section 87406 of the Act prohibits specified officials from acting as an agent or attorney or otherwise representing, for compensation, “any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof,” for one-year after the official left the agency’s employment “if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.” An appearance before a state administrative agency does not include an appearance in a court of law or before an administrative law judge. (Section 87406(d), see also regulation 18746.1).

Regulation 18746.2(a) further provides:

“(a) For purposes of Government Code Section 87406, a formal or informal appearance or oral or written communication is for the purpose of influencing if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding. An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding with in writing or by electronic transmission, *attending a meeting*, and delivering or sending any communication.” (emphasis added).

As a deputy district director for Caltrans District 8, you were a “designated employee” under the Act, i.e., a decision-making employee whose position is designated in a state agency’s conflict of interest code, and who is required to file an annual statement of economic interests. As a designated employee of Caltrans who has left state service, the Act’s one-year ban applies to you. (Section 87406(d)(1); regulation 18746.1(a)(2).)

Regulation 18746.1(b) provides guidance about when the prohibitions of the one-year ban will apply. Under that regulation, an official covered by the one-year ban is prohibited from making an appearance or communication if all of the following apply:

“(1) The official has left his or her state office or employment, which means he or she has either permanently left state service or is on a leave of absence.

(2) The appearance or communication is made within 12 months after leaving state office or employment.

(3) The public official is compensated, or promised compensation, for the appearance or communication. However, a payment made for necessary travel, meals, and accommodations received directly in connection with voluntary services is not prohibited or limited by this section.

(4) The appearance or communication is made on behalf of any person as an agent, attorney, or representative of that person. An appearance or communication made by a public official solely to represent his or her personal interests, as defined in 2 Cal. Code Regs. Section 18702.4, subdivision (b)(1), is not prohibited or limited by this section.

(5) The appearance or communication is made for the purpose of influencing, as defined in 2 Cal. Code Regs. Section 18746.2, any legislative or administrative action, or any discretionary act

involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property.

(A) Services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the prohibitions of this regulation, provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings. However, the prohibitions of Government Code Sections 87401 and 87402 [the permanent ban on “switching sides”] may apply.

(6) The appearance or communication is made before any officer or employee of any of the following:

(A) Any state administrative agency that the public official worked for or represented during the 12 months before leaving state office or employment...

(B) Any state administrative agency which budget, personnel, and other operations are subject to the direction and control of any agency described in subdivision (b)(6)(A)...

(C) Any state administrative agency subject to the direction and control of the Governor, if the official was a designated employee of the Governor's office during the 12 months before leaving state office or employment.”

B. Agencies Covered by the One-Year Ban.

A designated employee's state administrative agency means the agency for which he or she worked, or any board or commission under the agency's control. (*Gould Advice Letter*, No. A-96-077.) The agency you worked for was Caltrans. As a result, you may not for one year, for compensation, act as representative or agent for any person before Caltrans “for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.” (Section 87406.) You may, however, appear before agencies other than Caltrans, provided there is no prohibited conduct before an officer or employee of Caltrans involved in that appearance.

C. Communications Covered by the One-Year Ban.

Communications restricted by the one-year ban include any formal or informal appearance or oral or written communication made to influence legislative or administrative action or any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (Section 87406(d)(1).) These communications include, but are not limited to, conversing directly or by telephone, corresponding by writing or e-mail, attending a meeting, and delivering or sending any communication. (Regulation 18746.2(a).) A communication is considered to be for the purpose of influencing legislative or administrative action “if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.” (Regulation 18746.2(a).)

Not all communications to a former state administrative agency employer are prohibited by the one-year ban. An appearance or communication before a former state administrative agency employer, made as part of “services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the [one-year] prohibitions . . . provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings.” (Regulation 18746.1(b)(5)(A); *Quiring* Advice Letter, No. A-03-272; *Hanan* Advice Letter, No. I-00-209.) If your communications with Caltrans personnel will be for the purpose of administering, implementing, or fulfilling the requirements of a pre-existing contract or project involving CH2M HILL, they are not prohibited by the one-year ban so long as the services do not involve the issuance, amendment, awarding, or revocation of a permit, license, agreement or contract, or the sale or purchase of goods or property. This is a fact-specific query. To emphasize, these activities would be prohibited under the permanent ban if, while in state service, you participated in the proceedings as discussed above. (*Thomas* Advice Letter, No. A-05-089.)

Certain other types of communications are not restricted under the one-year ban. It is not considered a prohibited communication under the one-year ban, if an individual:

- “(1) Participates as a panelist or formal speaker at a conference or similar public event for educational purposes or to disseminate research and the subject matter does not pertain to a specific action or proceeding;
- (2) Attends a general informational meeting, seminar, or similar event;
- (3) Requests information concerning any matter of public record;
or

(4) Communicates with the press.” (Regulation 18746.2(b)(1)-(4).)

Finally, the Commission has advised that a former agency official may draft proposals on a client's behalf to be submitted to the agency so long as the former employee is not identified in connection with the client's efforts to influence administrative action. (*Cook* Advice Letter, No. A-95-321; *Harrison* Advice Letter, No. A-92-289.) Similarly, the ex-employee may use his or her expertise to advise clients on the procedural requirements, plans, or policies of the employee's former agency so long as the employee is not identified with the employer's efforts to influence the agency. (*Perry* Advice Letter, No. A-94-004.)

In summary, the one-year ban does not prevent you from requesting information generally available to the public about agency business from Caltrans or other state agencies. Nor does it prohibit you from attending informational meetings of Caltrans or another state agency regarding existing laws, regulations, or policies, as long as you do not attempt to influence the agency's legislative or administrative action or from advising your current employer or their clients on transportation projects involving Caltrans, as long as you are not identified in any communication with Caltrans and the action does not involve a proceeding in which you participated while employed by Caltrans. Social conversations with employees of Caltrans and other state agencies, not intended to influence administrative or legislative action, also are not prohibited by the ban. (*Tobias* Advice Letter, No. A-96-089.) (Section 87406(d)(1).)³

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: William J. Lenkeit
Counsel, Legal Division

Enclosure
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³ Further information is provided in the enclosed fact sheet prepared by the Commission to address common questions associated with post-employment restrictions.